

Ley Boon Hee (t/a "Ley & Sons Construction") v. Mohamed & Sons
Construction (Sued as a Firm)

[1995] 4 CLJ

Richard Malanjum J

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LEY BOON HEE (T/A "LEY & SONS CONSTRUCTION")

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v.

MOHAMED & SONS CONSTRUCTION (SUED AS A FIRM)

HIGH COURT SABAH & SARAWAK, MIRI

TUAN RICHARD MALANJUM J

[CIVIL SUIT NO. KG. 149 OF 1988]

30 JUNE 1995

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CONTRACT: *Sub-contract - Plaintiff to be remunerated from payment arising from principal agreement - Condition of agreement that defendant to assist plaintiff - Defendant failing to assist plaintiff - Whether sub-contract agreement breached - Principal agreement terminated - Whether plaintiff entitled to residual value for work done - Whether plaintiff entitled to retention sum arising from the principal agreement.*

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The defendant had on 27 June 1986 entered into an agreement (PWD agreement) with the Government of Sarawak for the construction and completion of S.M.K. Padawan, First Division, Sarawak (the project) pursuant to the defendant successfully tendering with the Public Works Department. The defendant then sub-contracted the project (sub-contract agreement) to the plaintiff upon terms and conditions which, *inter alia*, provided that the plaintiff shall remunerate the defendant an amount based on 3.5% of the value stated in the interim payment certificate, that the plaintiff shall be bound by the terms and conditions of the PWD agreement as if the plaintiff was a party to the contract, which was to form part and parcel of the agreement and that the defendant shall undertake to assist the plaintiff on the project when its assistance is required. The project was to be completed on 31 December 1987 but was later extended to 10 July 1988.

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The defendant however, terminated the sub-contract agreement, withdrew the termination, removed the plaintiff as the site representative and then renominated the plaintiff. As the dispute between the defendant and the plaintiff could not be resolved, the present suit was commenced. In the meantime, PWD terminated its agreement with the defendant. The plaintiff claimed that owing to the breach by the defendant of the sub-contract agreement and/or the PWD agreement, he had lost the benefit and the revenue that would have been derived thereunder.

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According to the plaintiff the breach occurred, amongst other things, when the defendant failed to co-operate with the plaintiff to enable him to perform his obligations and observe the works programme, which was implied as between the plaintiff and the defendant, and this hindered the plaintiff from carrying out the terms of the sub-contract agreement. The defendant's attempt to terminate the sub-contract agreement, which act according to the plaintiff was a fundamental breach of the contract, led to further delay. Learned Counsel for the defendant contended that the sub-contract should be considered illegal, null and void since there was no indication of any consent being obtained from the PWD/JKR prior to its execution, as stated in clause 20 of the general conditions of contract contained in the PWD contract. The defendant further contended that it was the inability of the plaintiff to perform the contract that led to the determination of the sub-contract agreement.

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The Court was left to decide on the following issues:

- (i) whether the defendant was in breach of the sub-contract agreement and/or the PWD contract arising from its action or omission;

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- a* (ii) whether there was residual value for work done and materials on site not paid for by PWD/JKR and if so, whether the plaintiff was entitled to them; and
- (iii) whether the plaintiff was entitled to the retention sum regardless of what happened.

Held:

- b* [1] On the balance of probabilities, the plaintiff has not proved his case in respect of the first issue. The plaintiff, who was already behind schedule, made no requests in writing to the defendant for help, and since it is very clear in the sub-contract agreement that the defendant undertook to assist upon request from the plaintiff, the plaintiff cannot say that he received no help nor co-operation from the defendant. It is also clear from the plaintiff's testimony and the sub-contract agreement that the plaintiff was at all times the one to be in control of the works.

- c* [2] Whilst it may be correct to say that implied terms such as the obligation of the defendant to co-operate with the plaintiff should be read into the sub-contract agreement, each case must be considered on its facts. The plaintiff, as the site representative of the defendant and the *de facto* contractor for the project, had direct access to PWD/JKR and was in the position to settle problems with PWD/JKR. He could also have done the works which were not affected by the problems. However, those works were not done to the satisfaction of
- d* PWD/JKR. Hence even if those implied terms were to be read as part of the sub-contract agreement, the facts of the case do not assist the plaintiff in his contention that the defendant was in breach of those terms.

- e* [3] The plaintiff's evidence that PWD/JKR did not fully assess the works done and materials on site which caused it to assess the percentage of works done to be lower than actual, in the absence of any evidence to the contrary from the defendant, should be accepted unchallenged. However, although PWD/JKR was involved and it was its assessments that were questioned, it was not heard pertaining to the issue, and since no other evidence was adduced to show that the assessments were incorrect or disputed, on the balance of probabilities the plaintiff has not proved his claim.

- f* [4] Clause 35 of the general conditions of contract as contained in the PWD contract stipulated that any retention sum would be paid upon the practical completion of the project and as certified by the engineer as defined therein. As the project was never completed there was no question of clause 35 having been complied with. It would therefore be unfair to order the defendant to pay the claim if it had not even been paid. On the balance of probabilities, the plaintiff has not established that the retention sum is due and payable to him by the defendant.

- g* [5] Clause 20 should not be taken as a contractual term and any breach thereof should not lead to any illegality.

[Claim dismissed with costs].

Cases referred to:

- h* *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.* [1993] 2 MLJ 250 (*refd*)
Obayashi Gumi Ltd. v. Industrial Fire-Proofing Pte. Ltd. [1991] 3 CLJ 2331 (*dist*)
Superintendent of Lands, Fourth Division, Sarawak v. Hamit Matussin & Ors. [1994] 3 MLJ 185 (*refd*)

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Legislation referred to:

Rules of the High Court 1980, O. 35 r. 4(3)

*For the plaintiff - Margaret Loy (Cheng Yi and Wendy Trang with her); M/s. Chan Kho & Loy
For the defendant - Andrew Winston Kaya; M/s. Idris & Co.*

JUDGMENT

Richard Malanjum J:

Introduction

In this action the plaintiff prays for the following:

- (1) the payment of the retention sum of RM129,309.48;
- (2) the payment of the residual value of the works done and the materials on site not paid for by Public Works Department Sarawak (PWD/JKR) to be assessed;
- (3) damages for breach and/or repudiation of contract, to be assessed;
- (4) interest; and
- (5) costs.

The claim of the plaintiff is founded on the premise that owing to the breach by the defendant of the sub-contract agreement dated 21 July 1986 (sub-contract agreement) and/or the PWD contract dated 27 June 1986 (PWD contract), he has lost the benefit and the revenue that would have been derived thereunder. The defendant denies the claim. In its defence the defendant denies the allegations of the plaintiff and in turn avers that it was the plaintiff's inability to perform that led to the determination of the sub-contract agreement.

At the commencement of the hearing of this action the plaintiff withdrew its allegations in paras. 24 and 25 of the statement of claim as well as prayer 2 thereof. Further, the bankruptcy of the plaintiff was disclosed but the consent of the official assignee was obtained in order to continue to prosecute this action.

Towards the end of the hearing learned Counsel for the defendant confirmed as well that he did not wish to proceed with the counterclaim as there was no sanction from the official assignee.

The Agreed Facts and Documents

Before opening her case, learned Counsel for the plaintiff tendered the following:

- (a) statement of agreed facts; and
- (b) bundle of agreed documents.

In respect of (b) learned Counsel for the plaintiff stated that the contents were also agreed upon by the parties. As the learned Counsel for the defendant consented to both (a) and (b) in terms as stated by the learned Counsel for the plaintiffs, I proceeded therefore to mark the statement of agreed facts as "A" and the bundle of agreed documents including the contents, as "Exhibit A".

The statement of agreed facts discloses the following and I reproduce herein, *verbatim*:

1. The plaintiff was at all material times a building contractor and the defendant was at all times, a firm of building contractors registered with the Public Works Department, Sarawak (hereinafter for brevity referred to as "PWD") under head II, class 'B'.

- a** 2. The defendant successfully tendered with PWD under tender no. T/545/12/85, for the construction and completion of S.M.K. Padawan, First Division, Sarawak, for a contract sum of RM5,965,500 (hereinafter referred to as "the project"). Subsequently, the defendant and the Government of Sarawak entered into a written agreement PWD/HO/B26/1986 dated the 27th day of Project.
- b** 3. On or about 21 July 1986 under and by virtue of a sub-contract agreement of the same date (hereinafter referred to as "the sub-contract agreement"), the defendant sub-contracted the project to the plaintiff on and upon the terms and conditions stated therein.
4. The said sub-contract agreement provides, *inter alia*:
- c** (i) Clause 1 - that the plaintiff shall remunerate the defendant an amount based on 3.5% of the value stated in the interim payment certificate, the penultimate certificate and the final certificate issued by the employer (PWD) in respect of the tender project from time to time issued by PWD;
- (ii) Clause 4(a) - that the plaintiff shall be bound by the terms and conditions of the agreement (ref: PWD/HO B26/1986) dated 27 June 1986 ... as if the sub-contractor (the plaintiff) is a party to the PWD contract and it is a further term of this agreement that the PWD contract shall form part and parcel of this agreement;
- d** (iii) Clause 4(b) that the plaintiff acknowledges receipt of a true copy of the PWD contract and all such relevant documents pertaining to the tender project and hereby takes all cognizance of the terms and conditions as stated therein and clause 4(b) further provides, *inter alia*, that the plaintiff undertakes to comply with the terms, conditions and regulations governing the tender project;
- (iv) Clause 5(b) - that the defendant shall undertake to assist the plaintiff on the project in so far as when its assistance is required by the sub-contractor (the plaintiff) in dealing administratively with the employer (PWD) to ensure the smooth implementation and execution of the tender project by the sub-contractor (the plaintiff) as the plaintiff had no '*locus standi*' to deal directly with PWD on the project, or in respect of the PWD contract;
- e**
- f** (v) Clause 7 - that the plaintiff shall be fully responsible for all profits made or losses incurred, claims and all other matters arising from the execution and completion of the tender project and hereby indemnifies the main contractor (the defendant) against all such losses, claims and all liabilities arising thereunder.
5. The plaintiff took possession of the site sometime in July 1986 from the defendant who had taken possession of the same from PWD.
- g** 6. Clause 26 of the general conditions of contract of the PWD contract provided that the time for the completion of the project fell on 31 December 1987. Pursuant to clause 29, upon the applications (*sic*) of the plaintiff, through the defendant, the time for the completion of the project had been extended by PWD on 21 December 1987 to 24 February 1988 and on 12 January 1988 to 10 July 1988.
7. The plaintiff had at all material times, fulfilled his obligations under clause 1 of the sub-contract agreement.
- h** 8. On 15 September 1987, the defendant, through their advocates, had by letter bearing the same date (for brevity, "the said letter of termination") terminated the sub-contract agreement. The defendant subsequently withdrew the letter of termination on 12 October 1987, without giving any reasons.
- i** 9. On 16 September 1987, the defendant informed PWD of the removal by them of the plaintiff as the site representative of the defendant. The defendant re-nominated the plaintiff to PWD as their representative on 21 October 1987.

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10. The disputes between the parties could not be resolved and led to this suit. a
11. The defendant took over the construction of the said project at a date subsequent to 21 October 1987.
12. The defendant was subsequently terminated by the PWD on 12 April 1989. The unresolved disputes between the defendant and PWD form the subject matter of Suit No. KG. 188 of 1989. The defendant, the plaintiff in the Suit No. KG. 188 of 1988 had filed a writ and a statement of claim dated 16 November 1989. b

The Issues

Having considered the agreed facts, the evidence adduced and the submissions of the respective learned Counsel for the parties, the following are the issues which require determination, viz:

- (i) whether the defendant was in breach of the sub-contract agreement and/ other arising from its actions or omission; c
- (ii) whether there was residual value for work done and materials on site not paid for by PWD/JKR and if so, whether the plaintiff is entitled to them; and
- (iii) whether the plaintiff is entitled to retention sum regardless of what has happened. d

The Evidence, Contentions and Findings

1. Issue (i): Whether the defendant was in breach of the sub-contract agreement and/or the PWD contract arising from its actions or omission,

(a) *The plaintiff's evidence and analysis*

Apart from the contents of “A” the plaintiff also testified as follows, in summary: e

- (1) that he had previous experience in supervising construction works worth millions of Malaysian Ringgit as he was a senior technical assistant with the PWD/JKR before resigning in 1984;
 - (2) that before he undertook the project he had already done two other projects worth millions of Malaysian Ringgit. However, the plaintiff did not elaborate his claim. And one doubt lingers in my mind and that is, the plaintiff left the government service in 1984 and the advertisement for the project came out in 1985 and in fact the work started in the middle of 1986. Thus, I ask myself whether it is possible to complete two million ringgit worth of projects between 1984 and the middle of 1986, a mere 2 1/2 years at most. I think it is more reasonable for the plaintiff not to cloud my decision making process with such a claim; f
 - (3) that it was the plaintiff who was instrumental in securing the project;
 - (4) that the plaintiff, in order to circumvent the requirement that the contractor for the project must be a bumiputera, met with Basri Mohd, for the defendant, who agreed to be the “front man” (to quote the plaintiff). Obviously, the deal can only be categorised as “Ali-Baba” a term coined by the business world of this country to denote the use of proxy to circumvent the eligibility requirements imposed by the relevant authorities; g
 - (5) that it was the plaintiff who paid for the tender deposit and the document fee. Incidentally, clauses (6a) and (6b) of the sub-contract agreement imposed upon the plaintiff to pay for the costs of the bank guarantee or insurance guarantee as might be required by PWD/JKR and also the costs for the insurance coverage against fire and the workman compensation insurance; h
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- a* (6) that the plaintiff was appointed as the site representative of the defendant and attended the first six site meetings which were also attended by various parties including the PWD/JKR;
- (7) that the plaintiff took possession of the site on 10 July 1986 which was before the execution of the sub-contract agreement;
- b* (8) that the plaintiff submitted the works programme to PWD/JKR and which was approved on 18 July 1986;
- (9) that PWD/JKR promised to amend the drawings but was never carried out;
- (10) that the plaintiff worked under the supervision of the project engineer with the overall supervision by the divisional engineer. Both engineers were PWD/JKR staff;
- c* (11) that the plaintiff as early as during the second site meeting held on the 14 February 1987 requested the amendments of the drawings;
- (12) that during the second site meeting the plaintiff claimed to have done 40% of the overall works on the project. However PWD/JKR assessed the work to be only 35%;
- (13) that there was no drawings provided for the switch room although it had to be done;
- d* (14) that PWD/JKR wanted the whole site turfed but the plaintiff argued that turfing was not within the PWD contract and thus a variation order was necessary to be issued;
- (15) that during the third site meeting held on 11 April 1987 the plaintiff claimed to have done 45% of the project works and the progress was not according to the works programme. The plaintiff attributed the delay to unresolved contractual matters. But looking at the minutes of the third site meeting (p. 50A of Exh. A) the works done was assessed to be only 37%. And the plaintiff was told to speed up the work and to resubmit a revised works programme for consideration. In that meeting the plaintiff had also the opportunity to voice out the causes of the delay. I have also noted as gathered from "Exh. A" that up to this third meeting the plaintiff did not make any request for assistance from the defendant. The first relevant letter dated 6 June 1987 on this issue appears to be at p. 55A of "Exh. A";
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- f* (16) that the fourth site meeting was held on 15 June 1987. The plaintiff said that there was no progress in the works and no sewage design and amended drawings were given as promised. But from the minutes of meeting (p. 56 "Exh. A") the plaintiff, although through the defendant, was told to concentrate on the building works and such other works where no additional drawings were required. In fact during that meeting it was disclosed that the sum of RM1.4 million had already been disbursed for the project and that future payments would be forth coming if the works proceeded;
- g*
- (17) that it was the complaint of the plaintiff that the defendant delayed for one month the transmission to him of a letter from PWD/JKR and he referred to the letters at p. 55B and C of "Exh. A". But looking at p. 54 of "Exh. A" which in fact refers to the same letter at p. 55C of Exh. A from PWD/JKR dated 6 May 1987 there is nothing to show that the defendant received it much earlier. Further, from the contents of the letter I do not see how the plaintiff could have been put in a disadvantaged position even if there was a delay in its transmission. That letter only went on to confirm what was agreed on the 24 April 1987 between the plaintiff, the consultant and the chief design engineer of PWD/JKR;
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- (18) that the fifth site meeting was held on 16 July 1987. The plaintiff said that he did whatever he could do. But judging from the minutes of meeting (p. 67-68 of "Exh. A") it is obvious that the plaintiff could not even meet the one month proposed works. It was also acknowledged by the plaintiff that he had to reorganise the works and to employ more workers; **a**
- (19) that it was also the evidence of the plaintiff that the defendant did not submit any application for extension of time although that was conveyed after the second site meeting. But there was no evidence adduced to show that the plaintiff did all he could do to facilitate the application for an extension. The defendant on its own could not be expected to make or justify the application for extension when works on the project was in fact carried out by the plaintiff. It is to be noted that the plaintiff never alleged that the defendant was an experienced contractor. In fact, in the plaintiff's own words, it was him who prepared the working paper programme for the project; **b**
- (20) that the sixth site meeting was held on 18 August 1987. The plaintiff said that the problem remained the same. He claimed that the defendant did not do anything to liaise with PWD/JKR on those problems despite his several letters. But again going by the minutes of meeting (p. 72 to 76 of "Exh. A") I find nothing whereby the plaintiff or the defendant made any further complaints. In fact the plaintiff/defendant were told to complete certain specified buildings in order for the Education Department to take over partially by the year end. And surprisingly even the works programme of the plaintiff/defendant was not ready for that meeting; **c**
- (21) that by a letter dated 15 September 1987 (p. 84 of "Exh. A") from the solicitors of the defendant the sub-contract agreement was terminated. According to the plaintiff the defendant also approached his workers even before the termination with a view to take over the project from him; **d**
- (22) that even after the letter of termination was issued, negotiation took place between the plaintiff and the defendant which resulted in the plaintiff returning to the site in late October 1987. But it did not last long as, according to the plaintiff, while he was reorganising his workers, the defendant took back the site without his prior knowledge. Thereafter, he received another termination letter. After a long negotiation the plaintiff finally managed to take out his equipment on 12 August 1988; **e**
- (23) that it was also the testimony of the plaintiff that the first 3 payments for the project were in order and as agreed. For the 4th, 5th, 6th and 7th payments there were delays and difficulties in getting them. And the plaintiff said that the defendant also asked for an additional 1.5% above the agreed 3.5% to be deducted from the payments of PWD/JKR. In respect of the 6th, 7th and 8th payments, the plaintiff said that he received much less from what he should have obtained even after the deduction of the 3.5%. As a result the plaintiff said that he had to come out with his own money for the project; **f**
- (24) that under cross-examination, the plaintiff said that the defendant had promised him that PWD/JKR would do the "contractual matters". Unfortunately, the plaintiff did not clearly elaborate the scope of the term. Be that as it may, I have taken note of clause 5b of the sub-contract agreement referred to in the statement of agreed facts; **g**
- (25) that it was also the stand of the plaintiff that he expected the defendant to approach PWD/JKR either personally or in writing pertaining to all the problems which he claimed to have existed. The plaintiff alleged that the defendant did not fully do his duties as required under the sub-contract agreement; **h**
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- a* (26) that the plaintiff nevertheless agreed that “natural circumstances” and the late approval from the Education Department were some of the causes of the delay. But subsequently he put the sole responsibility for the delay on the defendant; and
- (27) that the plaintiff agreed that he did have financial difficulty in so far as the project was concerned but disagreed that it caused the delay of works on the project.
- b* The plaintiff also called another witness PW1 - John Chua Heng Kuang, who was an architect with PWD/JKR. But his evidence was basically confined to identifying the PWD contract as well as the new contract on the project which he claimed to have been abandoned by the defendant. This witness also confirmed that between 1 July 1988 and 12 April 1989 there was no amended drawing issued although there were drawings attached to the variation order proposal which was approved by PWD/JKR but the work was never carried out.
- c* The defendant elected not to call any witness, preferring to rely on the agreed facts “A” and on the exhibits.
- Accordingly, O. 35 r. 4(3) of the Rules of the High Court 1980 was invoked by the learned Counsel for the plaintiff which entitled her to submit first.
- d* (b) *Submissions of Counsel*
- Learned Counsel for the plaintiff submitted the following points, in summary:
- e* (a) The defendant undertook to assist the plaintiff when assistance was required by the plaintiff in dealing administratively with PWD/JKR in order to ensure the smooth implementation and execution of the project. Problems such as the issuance of variation orders, amendments of drawings and instructions were not speedily given;
- f* (b) The implied terms as stated in para. 8 of the statement of claim and para. 3(a) and (b) of the amended reply should be implied so as to read into the sub-contract agreement some of the relevant terms of the PWD contract. Learned Counsel contended that such an approach should be taken in order to give the sub-contract agreement the business efficacy. The recent case of *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.* [1993] 2 MLJ 250 was cited. She further argued that someone had to be responsible for giving the necessary instructions to the plaintiff and that in this case, it had to be the defendant. According to learned Counsel the defendant did not comply with those obligations as pleaded in para. 3(b) of the amended reply, which reads (*verbatim*):
- g* It therefore follows that the defendant was under an obligation to perform the functions of the PWD engineer *vis-a-vis* the plaintiff in respect of the conditions of contract and more particularly in respect of clause 2(a), 2(b), 2(e), 2(i), 15, 27, 29 and 35. In breach thereof the defendants failed to perform said obligations at all. (*sic*).
- (c) Other alleged breaches by the defendant were also highlighted, namely:
- h* (i) for failing to ascertain the prices for variation purpose;
- (ii) for failing to provide fair and reasonable extension of time for completion of the project;
- (iii) for failing to certify a proper and full payment in favour of the plaintiff;
- (iv) for failing to cooperate with plaintiff so as to enable him to perform his obligations and observe the works programme. Learned Counsel contended that this is an implied term as between the plaintiff and the defendant. The case of *Obayashi Gumi Ltd. v. Industrial Fire-proofing Pte. Ltd.* [1991] 3 CLJ 2331 was cited;
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- (d) that the defendant interfered in the contractual relationships of the plaintiff with his workers and sub-contractors and such interference amounted to a breach of duty on the part of the defendant to cooperate with the plaintiff and thus hindered the plaintiff from carrying out the terms of the sub-contract agreement; **a**
- (e) as a consequence of the breaches of the defendant works on the project were disrupted and delayed; **b**
- (f) an attempt to terminate the sub-contract agreement by the defendant only led to further delay and that such an act was a fundamental breach of the sub-contract agreement as it was not even done in accordance with clause 30 of the PWD contract. Such failure amounted to a repudiation. And the subsequent attempt to revive the relationship did not materialise as the defendant failed to answer satisfactorily the requests of the plaintiff thereby compelling the plaintiff to accept the repudiation; **c**
- (g) the actions or inactions of the defendant were focused on replacing the plaintiff as the sub-contractor for the project. One example was the compulsion of an additional payment of 1 1/2% which was not officially accounted for; and
- (h) since it was obvious that the defendant was putting the blame on PWD/JKR, its liability towards the plaintiff could not be avoided by the defendant. Whatever compensation that could be recovered from PWD/JKR must be paid over to the plaintiff. **d**

In reply, learned Counsel for the defendant raised several matters, *inter alia*:

- (i) that the plaintiff should not have committed itself to the project as he lacked the financial means and experience since he was only doing supervisory work before becoming a contractor; **e**
- (ii) that the credibility of the plaintiff should be questioned as he was inconsistent pertaining to the date of his possession of the site. In his testimony he took possession on 10 July 1988 whereas in his letter dated 3 March 1988 (p. 149 of "Exh. A") the possession date was given as 1 July 1986; **f**
- (iii) that the delay was caused by several factors such as the necessity to amend the drawings and designs and these were known by the plaintiff as he was a former staff of PWD/JKR and had a good relationship with the department;
- (iv) that the plaintiff could and did raise the problems of the project during the site meetings as he was the site representative of the defendant and from his own evidence it would appear that he had a good rapport with the staff of PWD/JKR involved in the project; **g**
- (v) that the defendant had done its part by writing to PWD/JKR and by applying for extension of time for the completion of the project. It was given on 18 September 1987; **h**
- (vi) that since it was the testimony of the plaintiff that there were exchanges of correspondences between him and the defendant and its solicitors, it could not be said that there was lack of communication and assistance from the defendant;
- (vii) that the other causes of delay were the topography of the site, the inclement weather, labour shortage and the acts or omissions of PWD/JKR; and **i**

- a* (viii) that accordingly, no blame should be levelled against the defendant in view of the reasons for the delay.

Learned Counsel for the defendant also took an alternative stand by submitting that the sub-contract agreement should be considered illegal, null and void since there was no indication of any consent being obtained from the PWD/JKR prior to its execution. Clause 20 of the PWD contract was cited to substantiate his point.

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(c) Findings

Having heard the evidence and the submissions of learned Counsel for the parties and after a careful examination of the pleadings and the exhibits admitted in this trial, it is in my judgment that on the balance of probabilities the plaintiff has not proved his case in respect of this issue (i). I say so for the following reasons:

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- (1) Reference is made to my analysis and conclusions on the plaintiff's evidence hereinabove and I maintain them;

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- (2) It is obvious from the evidence of the plaintiff and the exhibits, in particular the Minutes of site meetings, that the plaintiff in fact attributed the problems which plagued the project to the conduct of PWD/JKR by ordering changes in the design and drawings but subsequently failing to supply the amended versions. On perusal of the exhibits, it is interesting to note that there was no request in writing from the plaintiff to the defendant prior to the letter dated 6 June 1987 (p. 55A of "Exh. A"). And by that time the plaintiff was already behind schedule. He was even asked during the third site meeting to speed up his work. Thus, I do not think it is fair for the plaintiff to say now that he received no help from the defendant. After all it is very clear in the sub-contract agreement that the defendant undertook to assist upon request from the plaintiff;

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- (3) Moreover, from the testimony of the plaintiff regarding the background of the sub-contract agreement, it was plain that it was the plaintiff who wanted to be in control of the works. He openly admitted that the defendant was only a "front man" and that he took care of all the initial cost. The plaintiff only had to remunerate the defendant the sum of 3 1/2% out of the sum mentioned in each of the payment certificates. No interference was expected from the defendant and it was only to act as and when requested by the plaintiff. Hence, in such a situation one should not expect much from the defendant. Yet the plaintiff now says that the defendant did not cooperate;

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- (4) The fact that the plaintiff was representative of the defendant thereby enabling him to have direct contact with PWD/JKR contradicted his allegations of non-cooperation and inaction on the part of the defendant. In all the site meetings he attended, the plaintiff was in the position to voice out his problems to PWD/JKR. And at times he did. But having scrutinised the minutes of meetings I could not resist the impression that the lack of resources and labour shortage played an important role in the dismal performance of the plaintiff. During the third site meeting the plaintiff was already being pushed to speed up the works. And during the fourth site meeting he was even told to do works on areas where no alterations were required. However, during the fifth site meeting the plaintiff could only say that he was trying his best and that he would increase his work force. What could the defendant do in such a situation? I think the plaintiff was trying to shift the blame elsewhere;

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- (5) The plaintiff contended that implied terms such as the obligation of the defendant to cooperate with the plaintiff should be read into the sub-contract agreement in order to give it business efficacy. Whilst that may be correct generally, each case must also be

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considered on its facts. The Singapore High Court case of *Obayashi Gumi (supra)* was relied upon. In that case the appellants, Obayashi Gumi Ltd. employed the respondent, a fire protective coating specialists, to do work on a 52 storey office building in which the appellants were the main contractor. Disputes arose on some of the claims of the respondent including the costs incurred in respraying with protective spray on the areas which the testing agent employed by the employer, Singapore Treasury Building Pte. Ltd., deemed to be not satisfactorily done in terms of thickness. The appellants contended that the costs should not be borne by them as they had no control over the testing agent and as such they could not be held to be vicariously responsible for any unreasonable testing adopted by the testing agent.

In reply, the respondent argued that its claim was founded on an implied term that the sub-contract works would not be rejected on the basis of testing that was unreasonable. Further, it was also contended that the claim was based on an express term of the sub-contract since it was the contractual obligation of the appellants to provide fire proofing spray.

The appeal was dismissed. It was held that there were implied terms, viz (i) that the appellants as the main contractor would ensure that the provisions of the main contract would be observed and performed by the employer and that the employer's servants or agents in discharging the duties assigned to them would discharge their duties with reasonable diligence and with reasonable skill and care and would not act unreasonably on the sub-contract works carried out by the respondent; and (ii) that the sub-contract works would not be rejected on the basis of testing that was unreasonable in amount or detail. And the learned Judge was of the view that there were good reasons to imply those terms as the respondents would be left with no redress. In that case I also noted that there was a clause, clause 27 in the sub-contract between the appellants and the respondent which obliged each party to render all necessary assistance in making claims against the employer for works connected to the sub-contract.

Now, in the present case, as I have stated earlier on, the background facts are important to consider. The plaintiff in this case was not left at the mercy of the defendant. He had direct access to PWD/JKR as he was the site representative of the defendant. And as I have also observed earlier that the plaintiff was the *de facto* contractor for the project. Thus, in my view, he was in the position to get the problems settled with PWD/JKR. He could also have done the works which were not affected by the problems. Yet from the minutes of site meetings those works were also not done to the satisfaction of PWD/JKR unlike in *Obayashi Gumi's (supra)* case where the respondent had actually done the work and was only claiming for the additional costs incurred. Hence, even if those implied terms as pleaded by the plaintiff were to be read as part of the sub-contract agreement, the facts of this case as I find them do not assist the plaintiff in his contention that the defendant was in breach of those terms. Moreover, clause 5(b) of the sub-contract agreement is not in *pari materia* to clause 27 of the sub-contract in *Obayashi Gumi's case (supra)*. I find therefore that that case is of no assistance to the plaintiff in his quest to attach liability upon the defendant;

- (6) Learned Counsel for the plaintiff in the present case attempted to equate the position of the plaintiff to that of the respondent in *Obayashi Gumi's case (supra)* in that he would be left without any redress. With respect, I do not agree. In that case there was no mention of any pending action against the employer. Further, there was also a finding of fact by an arbitrator that the respondent's work was subjected to extreme and unnecessary testing. That was accepted by the learned Judge. In the instant case it is

- a* not in dispute that there is a pending suit by the defendant against PWD/JKR - KG. 188 of 1989. And it is yet to be established as a fact whether the plaintiff and/or the defendant were put in a disadvantageous situation due to the actions or omissions by PWD/JKR. To conclude therefore at this stage that the defendant should be liable is premature. And to do so would also create a ridiculous situation in the event that in
- b* Suit KG. 188 of 1989 no liability could be attached to PWD/JKR. Incidentally, the present case is not one where the plaintiff would be left without any redress. He should, I think, consider other probable steps that he could take in relation to KG. 188 of 1989. But having said that it should not be taken in any way that I have expressed any view or finding in respect of that suit. I am very conscious of the fact that in the present suit PWD/JKR was not heard nor made a party to the action;
- c* (7) It was also not denied by the plaintiff that "natural circumstances" which I take it to mean the inclement weather, had a role in the delay. And although he said that his limited financial resources did not have any effect, I do not think so. If he was correct, then the project would have been completed. The minutes of site meetings whereby he was asked to expedite his works on the areas which were not affected by the changes of drawings only reflected that indeed the plaintiff had troubles of such a magnitude and not merely due to the absence of the amended drawings;
- d* (8) In my view it was also not clear as to what the plaintiff actually expected the defendant to do. No doubt in the letter dated 6 June 1987 (p. 55A of "Exh. A") the term "contractual matters" was used. But in the sub-contract agreement the defendant was only expected to assist in dealing administratively with PWD/JKR. And as I have stated earlier in this judgment that I find no obvious evidence indicating that the plaintiff did all he could to
- e* facilitate the assistance of the defendant in dealing with PWD/JKR. In fact as regards the extension of time I note that the defendant did make applications which were subsequently approved. (See: para. 6 of the statement of agreed fact - "A"); and
- f* (9) It was also the complaint of the plaintiff that excessive deductions were made by the defendant from the payments thus disrupting his cash-flow on the project. But having examined the evidence it could not have been that catastrophic as the plaintiff seemed to show. The delay in payment was only from July 1987 whilst the slow progress of works showed up as early as April of 1987 with only 37% of the works done according to PWD/JKR's assessment. And to recapitulate, the site possession took place on the 10 July 1986 and the construction period was for 18 months. The plaintiff also admitted that by June 1987 there was no progress of the works on the project. And the excessive deductions referred to by the plaintiff took place in the 7th and 8th interim payments
- g* which were in December 1987 and February 1988 respectively. If the dates were to be relied upon I do not think the deductions had anything to do with the slow progress of the works on the project.
2. *Issue (ii): Whether there was residual value for work done and materials on site not paid for by PWD/JKR and if so, whether the plaintiff is entitled to them.*
- h* (a) *The plaintiff's version*
- This issue comes within para. 26 of the statement of claim. In his evidence the plaintiff said that PWD/JKR did not fully assess the works done and materials on site. Hence, the percentage of works done as shown in the minutes of site meetings were lower than what had actually been done.
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(b) *Finding*

Normally, as the defendant did not adduce any evidence to rebut the evidence of the plaintiff, such evidence should be accepted as unchallenged. However, in this instant case PWD/JKR was involved and it was their assessments that were questioned. And PWD/JKR was not heard in this case pertaining to that issue. Furthermore, aside from the averment of the plaintiff there was no other evidence adduced to show that indeed the assessments of PWD/JKR were incorrect. It was also not recorded in the minutes of site meetings that the plaintiff or the defendant disputed the assessments. In addition, there was no evidence adduced that the defendant had been paid by PWD/JKR in excess of the percentages of works as recorded in the minutes of site meetings. Accordingly, for the foregoing reasons and on the basis of what I have stated when dealing with issue (i) hereinabove, in particular, the reason (6) of my finding, in my judgment on the balance of probabilities the plaintiff has not proved his claim as contained in para. 26 of the statement of claim in so far as this present action is concerned.

3. *Issue (iii): Whether the plaintiff is entitled to the retention sum as claimed regardless of what has happened.*

(a) *Plaintiffs version*

The plaintiff claims the sum of RM129,309.48 representing the balance of the retention sum due to him after the deduction of the 3.5% payable to the defendant. According to the plaintiff he is yet to be paid. It was also his evidence that the retention sum was retained by PWD/JKR.

(b) *Submissions of Counsel*

Learned Counsel for the plaintiff submitted that the evidence of the plaintiff on his entitlement to the retention sum was not challenged by the defendant. As such she said that the defendant should be liable to pay. And learned Counsel for the defendant surprisingly did not touch on that issue in his submission knowing well that no evidence was adduced by the defendant in the first place. Learned Counsel was contented I think to rely on his point of illegality of the sub-contract agreement which I will deal later. But for the purpose of this issue I do not think that point is helpful.

(c) *Finding*

In its defence the defendant denied any knowledge of the retention sum. And it went on to state that even if there was, it could not be paid to the plaintiff as he failed to complete the project. Now, clause 35 of the general conditions of contract as contained in the PWD contract (Exh. P4) stipulated that any retention sum would be paid upon the practical completion of the project and as certified by the Engineer as defined therein; In the present case it is not in dispute that the project was never completed by the plaintiff or the defendant. Thus, there is no question of clause 35 having been complied with. It would therefore be unfair to order the defendant to pay the claim if it had not even been paid. And in his own evidence the plaintiff said that the retention sum was retained by PWD/JKR. There was no evidence adduced by the plaintiff that PWD/JKR had paid the retention sum to the defendant which therefore in turn should be paid to him. As such I am not satisfied on the balance of probabilities that the plaintiff has established that the retention sum is due and payable to him by the defendant. Furthermore, the justice of this case requires that I should not make any order against the defendant on the retention sum in view of the facts and circumstances of this case.

a **Other Issues**

It was raised by the learned Counsel for the defendant that by virtue of clause 20 of the general conditions of contract contained in the PWD contract (Exh. P4), the sub-contract agreement should be held null and void as it was illegal for want of consent from the engineer as defined therein. Learned Counsel for the plaintiff replied that clause 20 should be taken as a contractual term and any breach thereof should not lead to any illegality.

b Having perused the said clause and bearing in mind the relationship between the parties hereto and also with PWD/JKR, I agree with the reply of the learned Counsel for the plaintiff. But since this issue will not alter my findings on the primary issues hereinabove I do not propose to dwell on it any further. Another matter which I should touch on is whether this case should have been heard with Suit KG. 188 of 1989. Perhaps it should have been done.

c However, this Court could not simply act on its own. This is a civil action in which the parties have the conduct. (See: *Superintendent of Lands, Fourth Division, Sarawak v. Hamit Matussin & Others* [1994] 3 MLJ 185). Since there was no application to consolidate this case with that suit I proceeded therefore to hear this action as it stood.

Conclusion

d In view of my findings hereinabove the only conclusion that I should make is that this action be dismissed with costs.

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